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Dato' Ting Check Sii v Pelita Towerview Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO 22–109 OF 2006-I
RHODZARIAH BUJANG JC
24 SEPTEMBER 2010

Companies and Corporations — Meetings — Board of directors — Resolution passed — Conversion of plaintiff's office to boardroom — Validity of resolution — Whether purported resolution void — Defendants admission that resolution void — Legitimacy of maintaining action — Whether plaintiff's action against defendants no longer maintainable

The plaintiff was suing two companies of which he had direct and indirect interests. At the time of the filing of this suit, he owned 44% of the shares in the second defendant company which in turn owned the first defendant company. The first defendant company is the owner of Wisma Sanyan, a 27 storey building in Sibu. The plaintiff as well as the only other shareholder of the second defendant company, Datuk Hj Tufail Mahmud, has an office each on the 27th floor of Wisma Sanyan. Both the plaintiff and Datuk Hj Tufail Mahmud were directors of the second defendant companies. On 17 January 2006, the board of directors' meeting resolved that the plaintiff's office at the 27th floor of Wisma Sanyan be converted into a boardroom. Accordingly, the first defendant company issued the plaintiff a notice to vacate his office. Aggrieved by the above, the plaintiff thus filed this suit seeking, inter alia, a declaration that the purported resolution passed by the board of directors meeting for the conversion of the plaintiff's office to a boardroom was void and of no effect and further, an injunction to restrain the defendants from denying the plaintiff access to his office at the 27th floor of Wisma Sanyan. The defendants, by their counsel's written submission, had made an admission and concession that the said resolution was void and of no effect. The defendants contended that once the admission and concession on the validity of the resolution was made there was no live issue to go for trial. Furthermore, the defendants' articles of association fixed the tenure of the plaintiff's directorship at one year though he could seek re-election after his compulsory retirement.

Held, allowing the application:

(1) The plaintiff not being a director for life with the defendants must compulsorily retire at the end of each year at the company's annual general meeting. Section 33(1) of the Companies Act 1965 made the articles of association that provides for this and the removal of the defendants' directors, binding on the plaintiff (see para 12).

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(2) Premised on the fact that the viability of the plaintiff's cause of action against the defendants hinges on a finding by the court that the resolution was void, which the defendants now admit, the plaintiff's action against the defendants was no longer maintainable. Since he has no permanent tenure as director of the defendant companies, the court cannot stop his removal as director nor make the other declaratory and injunctive orders sought by him and which he sought because of the resolution made by the board of directors to turn his office into a boardroom (see para 14).

(3) Whilst there is still a dispute on the validity of the resolution, the plaintiff can legitimately maintain this action but without it, and with the defendants' present stand that the resolution was void, it is as good as gone. Of course, the practical effect of this is the defendants cannot act on that resolution. This means that the plaintiff's physical office at Wisma Sanyan remains as long as he is still a director of the first defendant company and there is no valid resolution to turn that office into something else (see para 14).

[Bahasa Malaysia summary

Plaintif mendakwa dua syarikat di mana dia mempunyai kepentingan secara langsung dan secara tidak langsung. Pada masa pemfailan guaman ini, dia memiliki 44% saham-saham di dalam syarikat defendan kedua yang dimiliki oleh syarikat defendan pertama. Syarikat defendan pertama merupakan pemilik Wisma Sanyan, sebuah bangunan 27 tingkat di Sibu. Plaintif dan satu-satunya pemegang saham syarikat defendan kedua, Datuk Hj Tufail Mahmud, mempunyai pejabat setiap seorangh di tingkat 27 Wisma Sanyan. Plaintif dan Datuk Hj Tufail Mahmud merupakan pengarah-pengarah syarikat defendan kedua. Pada 17 Januari 2006, mesyuarat lembaga pengarah memutuskan bahawa pejabat plaintif di tingkat 27 Wisma Sanyan diubah kepada bilik lembaga pengarah. Seterusnya, syarikat defendan pertama mengeluarkan notis kepada plaintif untuk mengosongkan pejabatnya. Terkilan oleh perbuatan tersebut, plaintif memfailkan guaman ini menuntut, antara lain, pengisytiharan bahawa mesyuarat yang dikatakan telah diputuskan oleh mesyuarat lembaga pengarah untuk mengubah pejabat plaintif kepada bilik lembaga pengarah adalah tidak sah dan tidak berkuatkuasa dan seterusnya, satu injunksi untuk menahan defendan-defendan daripada menafikan akses plaintif kepada pejabat dia di tingkat 27 Wisma Sanyan. Defendan-defendan, melalui hujahan bertulis peguam mereka, telah membuat pengakuan dan konsesi bahawa ketetapan tersebut adalah tidak sah dan tidak berkuatkuasa. Defendan-defendan menghujah bahawa apabila pengakuan dan konsesi mengenai kesahan ketetapan telah dibuat maka tiada isu berbangkit untuk dibicarakan. Lebih-lebih lagi, tataurusan persatuan (*articles of association*) defendan-defendan menetapkan tempoh plaintif menjadi pengarah ialah selama setahun meskipun dia boleh menuntut untuk dipilih sekali lagi selepas persaraan wajibnya.

Diputuskan, membenarkan permohonan:

(1) Plaintif tidak menjadi pengarah untuk selama-lamanya kepada

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defendan-defendan seharusnya bersara pada penghujung setiap tahun pada mesyuarat agung tahunan syarikat. Seksyen 33(1) Akta Syarikat 1965 menetapkan tataurusan persatuan (*articles of association*) yang memperuntukkan perkara tersebut dan penyingkiran pengarah-pengarah defendan-defendan mengikat plaintif (lihat perenggan 12).

(2) Berpremiskan fakta bahawa kemungkinan kausa tindakan plaintif terhadap defendan-defendan berdasarkan dapatan mahkamah bahawa ketetapan tersebut adalah terbatal, di mana defendan sekarang mengakuinya, tindakan plaintif terhadap defendan-defendan tidak boleh diteruskan. Memandangkan dia tidak mempunyai tempoh kekal sebagai pengarah syarikat defendan-defendan, mahkamah tidak boleh menghentikan penyingkirannya sebagai pengarah ataupun membuat perintah pengisytiharan atau injunksi seperti dituntut olehnya dan sememangnya dituntut disebabkan ketetapan yang dibuat oleh lembaga pengarah untuk menukar pejabatnya kepada bilik lembaga pengarah (lihat perenggan 14).

(3) Meskipun terdapat pertikaian mengenai kesahan ketetapan tersebut, plaintif masih boleh mengekalkan tindakan ini dari segi undang-undang tetapi tanpanya dan penegasan defendan-defendan bahawa ketetapan tersebut adalah terbatal, ini bermakna plaintif tidak mempunyai kes. Ternyata, kesan praktikal daripada perkara tersebut ialah defendan-defendan tidak boleh bertindak atas ketetapan tersebut. Ini bermaksud pejabat plaintif di Wisma Sanyan akan kekal di situ selagi dia masih merupakan pengarah syarikat defendan pertama dan tidak terdapat sebarang ketetapan yang sah untuk menukarkan pejabat tersebut kepada sesuatu yang lain (lihat perenggan 14).]

Notes

For cases on meetings generally, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 477–536.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Asia Life Assurance Society Ltd v Kong Leong Aik [1992] 2 CLJ (Rep) 129, HC (refd)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

Lee v Chou Wen Hsien [1985] BCLC 45, PC (refd)

Legislation referred to

Companies Act 1965 s 33(1)

Rules of the High Court 1980 O 14A, O 18 r 19

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James Lo (James Lo Advocates) for the plaintiff.
Sim Hui Chuang (Lim Lip Sze (not present) and Wilian Yeo with him) (JM Lim & Co) for the defendants.

Rhodzariah Bujang JC:

RULING (ENCL 61)

[1] The plaintiff is suing two companies of which he has direct and indirect interests. At the time of the filing of this suit, he owned 44% of the shares in the second defendant company which in turn owned the first defendant company. The first defendant company is the owner of Wisma Sanyan, a 27 storey building in Sibu and the plaintiff as well as the only other shareholder of the second defendant company, Datuk Hj Tufail Mahmud has an office each on the 27th floor of Wisma Sanyan. Both the plaintiff and Datuk Hj Tufail Mahmud were directors of the second defendant companies.

[2] On 17 January 2006, Datuk Hj Tufail Mahmud called for a board of directors' meeting of the first defendant company which the plaintiff attended and at that meeting (despite the plaintiff's objection) it was resolved that the plaintiff's office at the 27th floor of Wisma Sanyan be converted into a boardroom. The first defendant company followed through that resolution by giving the plaintiff a notice to vacate his office within seven days from the date of the letter ie 18 January 2006.

[3] The plaintiff thus filed this suit for the following reliefs which being relevant to this decision, are set out in full below. The prayers in the plaintiff's statement of claim are:

(a) declaration that the purported resolution passed by the board of directors meeting on 17 January 2006 for the conversion of the plaintiff's office to a boardroom was void and of not effect;

(b) a declaration that the plaintiff is entitled to keep and maintain his personal office at the 27th floor Wisma Sanyan, Sibu;

(c) an order that the defendants be precluded from removing the plaintiff as a director of the defendants;

(d) an injunction to restrain the defendants by themselves or their servants or agents from denying the plaintiff access to his office at 27th floor Wisma Sanyan, Sibu;

(e) an injunction to restrain the defendants by themselves or their servants or

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agents from removing or otherwise dealing with the plaintiff's belongings, assets and chattels within the plaintiff's office at 27th floor Wisma Sanyan, Sibu;

(f) an injunction to restrain the defendants by themselves or their servants or agents from renovating the plaintiff's office at 27th floor Wisma Sanyan into a boardroom or any way interfering with the existing state and condition thereof; and

(g) damages.

[4] For the record, an interlocutory injunction as per prayers (d)–(f) was granted by Datuk Clement Skinner J (as His Lordship then was) on 12 January 2007. A year later, by a summons in chambers dated 25 January 2008, the defendants applied under O 14A and O 18 r 19 of the Rules of the High Court 1980 ('the RHC 1980') for questions of law to be determined by the court and to dismiss the plaintiff's claim herein on the grounds that the plaintiff's other action against Datuk Tufail Mahmud and Sanyan Holdings Sdn Bhd, ie a petition to wind up the first defendant company, was dismissed by the court. YA Datuk Linton Albert also disallowed that application and the matter is pending appeal in the Court of Appeal. The defendants have now filed another application, also under O 14A and O 18 r 19 of the RHC 1980.

THE PRESENT APPLICATION

[5] This application seeks to determine the following questions of law, namely:

(a) whether by the writ and statement of claim herein, the plaintiff is entitled to an order that the defendants be precluded from removing the plaintiff as a director of the defendant company; and

(b) whether, on the making of a declaration that the resolution passed by the board of director of the first defendant company on 17 January 2006 ('the resolution') is void and of no effect (prayer (a) the statement of claim) the plaintiff is entitled to only an order that the defendants do not act upon the resolution and is not entitled to prayers (b)–(g) of the statement of claim.

[6] The defendants' application is opposed by the plaintiff on two grounds raised in his affidavit in opposition. Firstly, he said it is barred by res judicata or issue estoppel by reason of the earlier application which was dismissed by YA Datuk Linton Albert and secondly, this matter is not suitable for an O 14A application unless the defendants admit that the board of directors' resolution made on 17 January 2010 was void and of no effect.

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[7] The defendants, by their counsel's written submission have made an admission and concession that the said resolution was void and of no effect. This they cannot do said the plaintiff's counsel in his submission because the validity of the resolution is part of the pleaded case of the defendants and in order to change that stand, the defendants must amend their pleading first.

[8] I cannot agree with that submission because in my view, the concession on facts can be made by counsel at any time in the proceedings and once made, it binds them throughout. In other words, they cannot blow hot and cold and be allowed to adopt facts only when it suits them. In the context of this case, the defendants cannot later retract their admission that the resolution is void even if I were to disallow their application afterwards.

[9] As for the res judicata issue, the admission and concession made by the defendants that the resolution passed was invalid has put a new spin to the factual matrix of this case which was not available in the earlier application. Therefore, even though the case of *Asia Life Assurance Society Ltd v Kong Leong Aik* [1992] 2 CLJ (Rep) 129 is relevant to support the defendants' contention that a decision made in an interlocutory application is not a final judgment that prevents the filing of another similar application, nonetheless my view is the said admission and concession has defeated the plaintiff's objection based on res judicata. It is trite law that for the doctrine of res judicata to apply, there must have been a final judgment on the issue or cause of action raised. The Court of Appeal in *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228; [2010] 7 CLJ 491 had summarised the principles of res judicata stated by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 and in the principles summarised, the finality of the earlier judgment is consistently mentioned. In this case the earlier O 14A and O 18 r 19 application was dismissed and that dismissal was based on considerations other than what the defendants are now admitting and conceding ie that the resolution was void.

[10] At any rate, I do not see the rules on procedure prohibiting the filing of two or more O 14A application (or O 18 r 19 for that matter) if the facts supporting such application warrants it and the decision in the earlier application does not affront the doctrine of res judicata.

THE MERITS OF THIS APPLICATION

[11] The defendants' argument is that the plaintiff is not entitled to the other reliefs he prayed for once the admission and concession on the validity of the resolution is made because there is no live issue to go for trial. Furthermore, the defendants' articles of association which is a contract that binds the plaintiff, fixed the tenure of the plaintiff's directorship at one year though he could seek

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re-election after his compulsory retirement. The articles of association also has a provision on the removal of its director. The defendants' counsel submitted that the directors of the companies not being directors for life, the plaintiff cannot seek the reliefs he prayed in this action relating to him maintaining his physical office in Wisma Sanyan and the injunctions to stop the defendants from removing him as a director, denying him access to his office at Wisma Sanyan, removing his personal belongings from it, renovating his office thereat into a boardroom and lastly granting him damages.

[12] The defendants' counsel have convinced me with their arguments above. The plaintiff not being a director for life with the defendants must compulsorily retire at the end of each year at the company's annual general meeting. Section 33(1) of the Companies Act 1965 made the articles of association that provides for this and the removal of the defendants' directors, binding on the plaintiff.

Section 33(1) of the Companies Act 1965 reads:

> Effect of memorandum and articles
>
> 33 (1) Subject to this Act the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

[13] In addition, the Privy Council's case cited by the defendants' counsel, *Lee v Chou Wen Hsien* [1985] BCLC 45 has decided that when the articles of association of a company provides for the retirement and removal of a director, and if he is removed, the director has no personal cause of action against the company. The same reasoning, I believed is applicable in respect of a director's compulsory retirement provided under the articles of association.

[14] On the strength of these law and premised on the fact that the viability of the plaintiff's cause of action against the defendants hinges on a finding by the court that the resolution was void, which the defendants now admits, the plaintiff's action against the defendants is no longer maintainable. Since he has no permanent tenure as director of the defendant companies, the court cannot stop his removal as director nor make the other declaratory and injunctive orders sought by him and which he sought because of the resolution made by the board of directors to turn his office into a boardroom. Whilst there is still a dispute on the validity of the resolution, the plaintiff can legitimately maintain this action but without it, and with the defendants' present stand that the resolution was void, it is as good as gone. Of course, the practical effect of this is the defendants cannot act on that resolution. This means that the

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plaintiff's physical office at Wisma Sanyan remains as long as he is still a director of the first defendant company and there is no valid resolution to turn that office into something else.

[15] I would therefore agree to answer the two questions framed in the application in the defendants' favour. The application is allowed but with an order that the defendants are not to act on the resolution to turn the plaintiff's office into a boardroom.

[16] In view of this decision, and particularly because the admission by the defendants on the invalidity of the resolution was only made after all these years, it is only fair that the defendants should not be given cost for winning this application.

Application allowed.

Reported by Ashgar Ali Ali Mohamed